Ahmad Amryn bin Abd Malek & Ors v Bursa Malaysia Securities Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-55–01 OF 2020
ANAND PONNUDURAI JC
17 JULY 2020

Civil Procedure — Enforcement — Defendant commenced enforcement action for alleged breach committed by plaintiff to issue financial statement within time frame — Plaintiff was fined by listing committee and upheld by appeal committee — No fine paid by plaintiff — Defendant filed originating summon against plaintiff — Plaintiff applied for conversion of originating summon to writ — Plaintiff applied for writ to be heard together — Defendant applied to strike out plaintiff's writ and statement of claim — Whether transfer of proceeding from originating summon to writ should be allowed — Whether sharing of common subject matter alone was sufficient to consolidate two matters — Whether plaintiff entitled to apply for judicial review proceeding — Capital Markets and Services Act 2007 s 360 — Rules of Court 2012 O 18 r 19 (1)(a), (1)(b), (1)(d)

The defendant was a stock exchange licensed under the Capital Markets and Services Act 2007 ('the CMSA 2007'). Wintoni Group Bhd ('Wintoni') was a public company listed on the official list of the defendant. As a listed corporation on the ACE Market, Wintoni must ensure compliance with the defendant's ACE listing requirements ('ACELR') so long as it remains on the official list of the defendant. The first and the second defendants were appointed as executive directors of Wintoni and the third plaintiff was appointed as an independent non-executive chairman of Wintoni and an audit committee member. The plaintiffs were all removed as directors on 20 June 2017. Under the ACELR, the defendant had the power to commence enforcement actions and imposed appropriate penalties including fines on a listed corporations and its directors in the event of any breach of the ACELR by them. On 10 October 2018, the defendant issued a notice of hearing to the plaintiffs enclosing a copy of listing committee memo ('LC Memo') which set out the alleged breaches of the ACELR committed by the plaintiffs ie breaches of rr 16.13(a) and (b) of the ACELR for causing and permitting knowingly, where they had reasonable means of obtaining such knowledge, Wintoni's failure to announce or issue the financial statements ('outstanding financial statements') within the stipulated time frames. The listing committee ('LC') resolved that the plaintiffs were in breach of the allegation. The plaintiffs were notified of the LC's decision and a fine of RM75,500 was imposed to the first plaintiff, RM30,200 fine to the second and third plaintiff. The plaintiffs then appealed to the AC which upheld the decision made by LC. Due to the failure

of the plaintiffs to pay the fines, the defendant filed the originating summons in the Kuala Lumpur Sessions Court pursuant to s 360 of the CMSA 2007 to enforce the LC's decision which was upheld by the appeal committee ('AC'), including the imposition of fines on the plaintiffs. The plaintiffs applied in encl 5 for the originating summon application ('OS146') to be converted to a writ action and be heard together. The defendants applied in encl 15 for striking out the plaintiffs' writ and statement of claim pursuant to O 16 r 19 (1)(a), (b) and (d) of the Rules of Court 2012.

Held, dismissing plaintiff's application in encl 5 and allowing defendant's application in encl 15 to strike out plaintiff's writ and statement of claim:

(1) It must be emphasised that the burden lies on the plaintiffs to satisfy the court that the transfer of proceedings would ensure that the originating summon action was more conveniently or fairly tried in order to achieve the end purpose of serving the interest of justice. A mere sharing of a common subject matter alone was not a sufficient ground for an order to consolidate the two matters. The originating summon proceeded by way of affidavits and could be determined fairly quickly as opposed to a writ action. Even though OS146 was already heard and only pending a decision, there would be no saving of time and costs by consolidating the two actions. The nature and scope of the relief claimed in OS145 was more appropriate to be heard on its own (see paras 13 & 17–19).

(2) It was common ground that the plaintiffs did not commenced judicial review proceedings to challenge the decision and fines imposed by the LC and AC. The plaintiffs' ground for the transfer application were without merit and there was no necessity for OS146 to be transferred to the present court. Since OS146 was only pending the delivery of decision soon, ordering a transfer would cause delay to its disposal and would not save time and costs (see paras 21 & 24).

(3) The court was of the considered view that the plaintiffs challenges on the LC's and AC's decision which were made in the discharge of the defendants statutory and regulatory duties under the CMSA and the ACE LR which were enacted pursuant to s 9 and 11 of the CMSA 2007 were clearly centred on public law arguments. The contentions of the plaintiffs of an absence of statutory jurisdiction to impose fines were predominantly issue concerning substantive principle of public law. As such, the challenges ought to have been properly ventilated though by judicial review proceedings. The mere inclusion of a declaratory prayer did not translated a matter of public law into a matter of private law as it would be very easy for an aggrieved person in an issue of public law to side step the rigours of O 53 by merely including a prayer for declaration. There was merit in the defendant's contention that the plaintiff's action was clearly an afterthought and a belated attempt to challenge the

sanctions imposed and only filed after the filing of OS146 by the defendant to enforce the fines. There was nothing precluding the plaintiffs from seeking an extension of time to file judicial review proceedings (see paras 42, 45 & 47–48).

[Bahasa Malaysia summary

Defendan adalah bursa saham yang dilesenkan di bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP 2007'). Wintoni Group Bhd ('Wintoni') adalah syarikat awam yang disenarai dalam senarai rasmi defendan. Sebagai syarikat disenarai dalam pasaran ACE, Wintoni harus memastikan kepatuhan dengan keperluan penyenaraian ACE defendan ('ACELR') selagi ia kekal dalam senarai rasmi defendan. Defendan pertama dan kedua dilantik sebagai pengarah eksekutif Wintoni dan plaintif ketiga dilantik sebagai pengerusi bebas bukan eksekutif bagi Wintoni dan ahli jawatankuasa audit. Kesemua plaintif dibuang sebagai pengarah pada 20 Jun 2017. Di bawah ACELR, defendan mempunyai kuasa untuk memulakan tindakan penguatkuasaan dan menjatuhkan hukuman yang sewajarnya termasuk denda ke atas syarikat disenarai dan pengarahnya sekiranya berlaku pelanggaran ACELR oleh mereka. Pada 10 Oktober 2018, defendan mengeluarkan notis pendengaran kepada pihak plaintif yang menyertakan salinan memo jawatankuasa penyenaraian ('memo LC') yang menyatakan dakwaan pelanggaran ACELR yang dilakukan oleh pihak plaintif iaitu pelanggaran peraturan 16.13(a) dan (b) ACELR kerana menyebabkan dan membenarkan dengan sengaja, di mana mereka mempunyai cara yang munasabah untuk memperoleh pengetahuan tersebut, kegagalan Wintoni untuk mengumumkan atau mengeluarkan penyata kewangan ('penyata kewangan tertunggak') dalam tempoh masa yang ditetapkan. Jawatankuasa penyenaraian ('LC') memutuskan bahawa plaintif melanggar dakwaan tersebut. Plaintif dimaklumkan mengenai keputusan LC dan denda RM75,500 dikenakan kepada plaintif pertama, denda RM30,200 kepada plaintif kedua dan ketiga. Plaintif kemudian mengemukakan rayuan kepada AC yang mengekalkan keputusan yang dibuat oleh LC. Oleh kerana kegagalan pihak plaintif melunaskan denda, defendan memfailkan saman pemula di Mahkamah Sesyen Kuala Lumpur berdasarkan s 360 APMP 2007 untuk menguatkuasakan keputusan LC yang dikekalkan oleh jawatankuasa rayuan ('AC'), termasuklah pengenaan denda ke atas plaintif. Plaintif memohon melalui lampiran 5 agar permohonan saman pemula ('OS146') ditukar menjadi tindakan writ dan didengar bersama. Defendan memohon melalui lampiran 15 untuk membatalkan writ dan pernyataan tuntutan plaintif menurut A 16 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah 2012.

Diputuskan, menolak permohonan plaintif dalam lampiran 5 dan membenarkan permohonan defendan dalam lampiran 15 untuk membatalkan writ dan pernyataan tuntutan plaintif:

(1) Ianya perlu ditekankan bahawa beban adalah terhadap plaintif untuk meyakinkan mahkamah bahawa pemindahan prosiding akan memastikan bahawa tindakan saman pemula dapat dibicarakan dengan lebih mudah atau adil demi mencapai tujuan akhir untuk memastikan kepentingan keadilan. Sekadar perkongsian perkara utama yang sama sahaja bukanlah alasan yang cukup untuk memberikan perintah penggabungan kedua-dua perkara tersebut. Saman pemula yang diteruskan melalui afidavit dan dapat ditentukan dengan cepat berbanding dengan tindakan writ. Walaupun OS146 sudah didengar dan hanya menunggu keputusan, tidak akan ada penjimatan masa dan kos dengan menggabungkan kedua-dua tindakan tersebut. Sifat dan skop relif yang dituntut dalam OS145 lebih wajar untuk didengar dengan sendirinya (lihat perenggan 13 & 17–19).

(2) Ianya adalah alasan bersama bahawa plaintif tidak memulakan prosiding semakan kehakiman untuk mencabar keputusan dan denda yang dikenakan oleh LC dan AC. Alasan plaintif untuk permohonan pemindahan adalah tanpa merit dan tidak mempunyai keperluan untuk OS146 dipindahkan ke mahkamah semasa. Oleh kerana OS146 hanya menunggu keputusan yang akan diberikan, membenarkan pemindahan akan menyebabkan kelewatan pelupusannya dan tidak akan menjimatkan masa dan kos (lihat perenggan 21 & 24).

(3) Mahkamah berpendapat bahawa plaintif membantah keputusan LC dan AC yang dibuat dalam melaksanakan tugas undang-undang dan peraturan oleh defendan di bawah APMP dan ACE LR yang digubal berdasarkan s 9 dan 11 APMP 2007 yang jelas berpusat pada penghujahan undang-undang awam. Dakwaan oleh plaintif tentang ketiadaan bidang kuasa undang-undang untuk mengenakan denda adalah isu utama mengenai prinsip asas undang-undang awam. Oleh yang demikian, bantahan tersebut seharusnya dibicarakan dengan teratur melalui prosiding semakan kehakiman. Dengan hanya memasukkan relif deklarasi tidak menterjemahkan perkara undang-undang awam ke dalam perkara undang-undang persendirian kerana ianya akan menjadi sangat mudah bagi seseorang yang terkesan dalam isu undang-undang awam untuk mengetepikan A 53 yang tegas dengan hanya memasukkan relif untuk deklarasi. Terdapat merit dalam dakwaan defendan bahawa tindakan plaintif adalah jelas merupakan pemikiran semula dan percubaan terlewat untuk mencabar denda yang dikenakan dan hanya difailkan setelah pemfailan OS146 oleh defendan untuk menguakuasakan denda tersebut. Tidak ada sebarang halangan ke atas plaintif untuk memohon lanjutan masa bagi memfailkan prosiding semakan kehakiman (lihat perenggan 42, 45 & 47–48).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (folld)
Bursa Malaysia Securities v Gan Boon Aun [2018] MLJU 1416, CA (distd)
Can-One Bhd & Ors v Bursa Malaysia Securities Bhd [2013] MLJU 1640, HC (refd)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265, FC (refd)
Law Siew Ngoh & Anor v Bursa Malaysia Securities Bhd [2019] 7 MLJ 1, HC (refd)
Lo Man Heng v Bursa Malaysia Securities Bhd [2017] MLJU 490, HC (refd)
MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad [2007] 8 MLJ 277, HC (refd)
MTD Capital Bhd v Tan Sri Dr Azmil Khalili bin Khalid [2020] 8 MLJ 252; [2019] MLJU 489, HC
Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor [2014] 3 MLJ 74, CA (refd)
Mohd Anuar bin Hemdi & Anor v Raz Intan Development Sdn Bhd & Ors [2019] MLJU 194, HC (refd)
Mohd Faidzal bin Ahmad Mahidin v Bursa Malaysia Securities Bhd [2017] MLJU 495, HC (refd)
Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd And Ors [2010] MLJU 1854, HC (refd)
OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor [1983] 1 MLJ 179, FC (folld)
Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2009] 1 MLJ 676; [2005] MLJU 113, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 6(2)(b)(vi), (c), 9, 11, 360, 360(1)(c)(i), (J), (K), (P)
Companies Act 1965
Courts of Judicature Act 1964 s 65
Federal Constitution art 97
Limitation Act 1953 s 6(1)(d), 6(4)
Public Officers (Conduct and Discipline) Regulations 1993
Rules of Court 2012 O 4, O 4 r 1(1), O 18 r 19, O 53, O 57, O 57 rr 1(2), (4), (4)(E)
Securities Industry Act 1983 (repealed by Capital Markets And Services Act 2007)

Mak Lin Kum (Syed Ibrahim & Co) for the plaintiffs.

Nimalan Devaraja (Danielle Dickman with him) (Skrine) for the defendant.

Anand Ponnudurai JC:

[1] This judgment will deal with two applications filed by the parties namely:

(a) encl 5 which is the plaintiffs' application that the proceedings in Kuala Lumpur Sessions Court Originating Summons No WA-A54–146–11 of 2019 ('O5146') be transferred to this court, to be converted to a writ action and to be heard together with this suit; and

(b) encl 15 which is the defendant's application pursuant to O 18 r 19(1)(a), (b), (d) for the plaintiffs' writ and statement of claim to be struck off.

[2] Prior to hearing encls 5 and 15, both parties disagreed as to which application should be heard first with both parties contending that each party's application should be heard before the other. I had then decided that it would be prudent to hear both applications simultaneously whereby parties had filed their respective written submissions and submitted orally before me on both applications on 3 June 2020.

[3] Having considered the respective submissions and applying the law to the facts, I will now set out the grounds for my judgment on the two applications.

FACTUAL MATRIX

[4] The background facts in this matter are predominantly undisputed and they are as follows:

(a) the defendant is a stock exchange licensed under the Capital Markets and Services Act 2007 ('the CMSA 2007'). Pursuant to s 11 of the CMSA 2007, the defendant has a statutory duty to ensure, so far as is reasonably practicable, a fair and orderly market for the securities that are traded through its facilities;

(b) Wintoni Group Bhd ('Wintoni') is a public company listed on the official list of the defendant ie on the ACE market. As a listed corporation on the ACE market, Wintoni must ensure compliance with the defendant's ACE listing requirements ('ACE LR') so long as it remains on the official list of the defendant;

(c) the first and second plaintiffs were appointed as executive directors of Wintoni on 20 November 2015. The third plaintiff was appointed as an independent non-executive chairman of Wintoni on 10 September,

2015 and an audit committee member on 23 September 2016. The plaintiffs were all removed as directors on 20 June 2017;

(d) under the ACE LR, the defendant has the power to commence enforcement actions and impose appropriate penalties, including fines, on, among others, a listed corporation and/or its directors in the event of any breach of the ACE LR by them. Additionally, it is undisputed that the plaintiffs, as directors of Wintoni, had provided letters of undertaking to comply with the ACE LR. Hence, the plaintiffs are bound by the ACE LR and are/ought to be aware of the defendant's powers under the ACE LR including its enforcement powers;

(e) on 10 October, 2018, the defendant issued a notice of hearing/deliberation to the plaintiffs enclosing a copy of the Listing Committee Memo No L14 of 2018 ('LC Memo') which sets out the alleged breaches of the ACE LR committed by the plaintiffs ie breaches of rr 16.13(a) and (b) of the ACE LR for causing and permitting knowingly, where they had reasonable means of obtaining such knowledge, Wintoni's failure to announce/issue the following financial statements ('outstanding financial statements') within the stipulated time frames ('Wintoni's breaches'):

(i) the quarterly report for the financial period ended 30 September, 2015;

(ii) the annual report that included the annual audited financial statements together with the auditors' and directors' reports ('annual report') for the financial year ended 31 December 2015; and

(iii) the annual report for the financial year ended 31 December 2016 (*this notice dated 10th October 2018, appears at exh AA1 of encl 7*)

(f) the matter was deliberated by the LC and after due consideration of all the facts and circumstances of the matter, including:

(i) the documents and written representations submitted by all parties; and (see exh AA2 of encl 7);

(ii) the oral representations of the first and second plaintiffs who had attended the LC hearing on 15 November 2018 to defend themselves and the third plaintiff, the LC resolved that the plaintiffs were in breach of rr 16.13(a) and (b) of the ACE LR for causing and permitting knowingly, where they had reasonable means of obtaining such knowledge, Wintoni's failure to announce/issue the outstanding financial statements within the stipulated time frames. A public reprimand and fine was therefore imposed on each of the plaintiffs respectively; and

(iii) it should be noted that at this juncture in 2018, the plaintiffs did not raise any objections to the defendant's powers to convene a hearing before the LC to deliberate on the plaintiffs' breaches and/or to impose fines on the plaintiffs and before the AC to hear the plaintiffs' appeal against the LC's decision in accordance with the ACE LR. In my view, it was clear that the plaintiffs had accepted the jurisdiction of the LC and AC to deliberate on their alleged breaches of the ACE LR and impose the requisite fines upon them;

(g) by way of letters dated 18 December 2018, the plaintiffs were notified of the LC's decision in accordance with r 16.19(1)(b) of the ACE LR which included the imposition of the following fines:

(i) first plaintiff: a total fine of RM75,500;

(ii) second plaintiff: a total fine of RM30,200; and

(iii) third plaintiff: a total fine of RM30,200.
(*see exh AA3 of encl 7*)

(h) the plaintiffs then appealed to the AC. Vide letters dated 6 May 2019, the defendant notified the plaintiffs of the AC's decision to uphold the LC's decision;
(*see exh AA4 and AA5 of encl 7*)

(i) due to the failure of the plaintiffs to pay the fines imposed on them by the LC and AC, the defendant had on 29 November, 2019 filed the originating summons in the Kuala Lumpur Sessions Court pursuant to s 360 of the CMSA 2007 to enforce/implement the LC's decision which was upheld by the AC, including the imposition of fines on the plaintiffs ('OS146'); and

(j) the plaintiffs filed this writ action on 30th January, 2020 against the defendant.

[5] A perusal of the cause papers filed in OS146 in the sessions court and the relevant affidavits in support and opposition thereto (appears as exh AA6 to encl 7) where after setting out the background facts leading to the imposition of the fines against the three defendants which were yet to be paid, the plaintiff was moving the sessions court for an order that the said fines be entered as if they were judgments.

[6] In opposing the application, the plaintiff's herein (who were the defendants in OS146), inter alia, contended that the defendant's decisions to fine them and that the decisions of the listing committee and the appeals committee were improper and that the fines imposed were illegal.

[7] In relation to encl 5, it is the plaintiffs' contention herein that pursuant

to O 57 and O 4 of the Rules of Court 2012, OS146 ought to be transferred to this court to be heard together so as to avoid inconsistent judgments as there were common questions of law and fact in both matters. In particular, the plaintiff submits that the common issue in both suits which required determination, is whether or not Bursa had the power to impose fines or penalties.

[8] The defendant herein, on the other hand, opposed the transfer application on the following basis:

(a) the filing of this writ action by the plaintiffs to, in essence, challenge the listing committee's ('LC') and appeals committee's ('AC') decisions dated 18 December 2018 and 5 May 2019 respectively to impose fines on the plaintiffs is wrong in law and ought not be entertained by this honourable court as any challenge against the LC's and AC's decisions should be made by way of judicial review;

(b) this honourable court is not the appropriate court for the expeditious disposal of the OS action. This is especially so as the filing of written submissions for the OS action have been exhausted and the matter is only pending the delivery of decision from the sessions court;

(c) there are no common questions of law or fact arising from this writ action and the OS action; and

(d) accordingly, the transfer of the OS action to this honourable court would hinder the efficient and expeditious disposal of the OS action and cause parties to incur unnecessary wastage of time, costs, and effort.

[9] I will now firstly deal with the legal principles for transfer of proceedings.

[10] Order 57 r 1(2) of the ROC 2012 provides that the High Court judge has the power to transfer any proceedings from a subordinate court to the High Court upon an application by any party.

[11] Order 57 r 1(4) of the ROC 2012 further sets out the grounds which the High Court judge should consider in assessing whether to grant an order for transfer of proceedings. Upon perusal of the plaintiffs' AIS, it appears that the allegations raised by the plaintiffs in support of the transfer application, if at all, falls under O 57 r 1(4)(E) of the ROC 2012 are set out below:

> 1 Transfer of proceedings to another Court
>
> (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.

...

(4) Before making any order to transfer any proceedings from:

(a) the High Court to another High Court of co-ordinate jurisdiction;

(b) a Subordinate Court to the High Court;

(c) the High Court to a Subordinate Court; or

(d) a Subordinate Court to another Subordinate Court, the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where:

(A) the cause of action arose;

(B) the defendant, or one of the several defendants, resides or has his place of business;

(C) the facts on which the proceedings are based exist or are alleged to have occurred;

(D) the land the ownership of which is disputed is situated; or

(E) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

[12] When determining whether an order should be made pursuant to sub-para (E) of O 57 r 1(4) of the ROC 2012, the court has a rather wide discretion to determine whether the reasons put forth by the applicant is fit and appropriate to achieve the end purpose of ensuring that the interest of justice is served. The court must also be satisfied that the matter, if transferred, can be 'more conveniently or fairly tried' by the said court. This was espoused by Mohd Radzi Harun JC in the case of *Mohd Anuar bin Hemdi & Anor v Raz Intan Development Sdn Bhd & Ors* [2019] MLJU 194 (HC), when disallowing an application for a transfer of proceedings from the sessions court to the High Court.

[13] It must be emphasised that the burden lies on the plaintiffs to satisfy the court that the transfer of proceedings would ensure that the OS action is more conveniently or fairly tried in order to achieve the end purpose of serving the interest of justice.

[14] An application for proceedings to be heard together is made pursuant to O 4 r 1(1) of the ROC 2012 which provides that:

1 Consolidation of causes or matters

(1) Where two or more causes or matters are pending, and if it appears to the Court that:

(a) some common question of law or fact arises in both or all of them;

(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) for some other reason it is desirable to make an order under this rule, the Court may order the causes or matters to be consolidated on such terms as it thinks just or may order the causes or matters to be tried at the same time or one immediately after another or may order any of the causes or matters to be stayed until after the determination of any other of the causes or matters.

[15] The law and test to be applied in determining such an application was laid down by Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in the Federal Court case of *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 (FC) when His Lordship held at p 251:

> The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed of at the same time' (*Payne v British Time Recorder Co* [1921] 2 KB 1, *Horwood v British Statesman Publishing Co Ltd* [1929] WN 38, *Daws v Daily Sketch* [1960] 1 All ER 397). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same'.

[16] The test pronounced in the case of *Central Securities* above was also applied by Justice Abdul Malik Ishak in *MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad* [2007] 8 MLJ 277 (HC), when deciding on an application for two proceedings to be heard together. Justice Abdul Malik Ishak held as follows:

> [28] It is ideal to put in the forefront of my mind the main principles governing consolidation. It is solely to save time and costs (*Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd* [1973] 1 MLJ 31b). And that an order for consolidation may be made where the parties in the actions are theperson or different persons and this simple principle can be distilled from the case of *Horwood v British Statesman Publishing Co Ltd* [1929] WN 38.

[17] In my considered view, at first blush there does appear to be a sharing of a common subject matter in the current suit and in OS146, ie the powers of Bursa to impose fines. However, a mere sharing of a common subject matter alone is not a sufficient ground for an order to consolidate the two matters. Furthermore, the OS proceeds by way of affidavits and can be determined fairly quickly as opposed to a writ action herein — see the case of *MTD Capital Bhd v Tan Sri Dr Azmil Khalili bin Khalid* [2020] 8 MLJ 252; [2019] MLJU 489 (HC) where it was held:

A [75] Given that the questions of law or facts are different and that the relevant transaction or series of transactions giving rise to the reliefs claimed are also different, there is no real basis for the OS action and the writ action to be consolidated.

B [76] Even though there is a sharing of a common subject matter, namely the Maybank Trust, this alone is not a sufficient ground for an order to consolidate the two matters. In fact, because the reliefs sought for in the OS action are for an historical account of the investments made under the Maybank Trust, an expeditious disposal of the OS action may assist the parties in the writ action.

C [77] The OS action proceeds by way of affidavits and does not require oral evidence adduced at a trial. It can be determined fairly quickly. This is distinct from the writ action where oral testimony will need to be adduced. There will be no saving of time and costs by consolidating the two actions. The OS action can be and ought to be pursued independently of the writ action.

D [78] There is also no possibility of inconsistent judgments if the OS action is heard separately and independent of the writ action since the issues and the reliefs claimed are different and distinct.

[18] In my view, bearing in mind that OS146 has already been heard but E only pending a decision, there will be no saving of time and costs by consolidating the two actions.

[19] I also have taken into account the nature and the scope of the relief claimed in OS146 and am of the view that it would be more appropriate for F OS146 to be heard on its own. To me the sessions court by virtue of s 65 of the Courts of Judicature Act 1964 has the power to make the orders sought by Bursa to enforce the fines.

[20] As highlighted above, OS146 was filed pursuant to s 360 of the CMSA G for the court to make certain orders to enforce the LC's and AC's decisions to impose the fines. The test to be applied in dealing with proceedings filed pursuant to s 360 was aptly set out by Azizul Azmi J in the case of *Law Siew Ngoh & Anor v Bursa Malaysia Securities Bhd* [2019] 7 MLJ 1 (HC) whereby H His Lordship held that it would suffice for the defendant to establish that:

(a) the exchange has found there to have been a contravention of its rules; and

(b) the appeals process provided under the rules of the exchange has been exhausted, or no appeal has been made against the determination of the exchange within the period in which an appeal has to be made. The proper recourse to challenge the I decisions of the defendant is by way of judicial review.

[21] As will be highlighted and discussed later when dealing with encl 15, it is common ground that the plaintiffs did not commence judicial review proceedings to challenge the decision and fines imposed by the LC and AC.

Therefore, in my view the plaintiffs' grounds for the transfer application are without merit and there is no necessity for OS146 to be transferred to this court.

[22] This leaves me with one last issue which is the fact that the plaintiff had on 6 March 2020 amended their statement of claim to seek a declaration that r 16.19 of the ACE listing requirements is in contravention of art 97 of the Federal Constitution.

[23] The defendant in their amended defence, pleads that as the fines imposed pursuant to the ACE LR are not paid into the Federal Consolidated Fund, any argument on contravention of the Federal Constitution is baseless. Notwithstanding that it appears clear that the defendant has the necessary powers to impose fines, as submitted by the defendant, the plaintiff ought to have raised this issue in the OS146 and sought the necessary order to have the issue referred to the High Court for determination as held in the case *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 (FC).

[24] I am also of the view that since OS146 is only pending the delivery of decision soon, ordering a transfer would cause delay to its disposal and would not save time and costs. In the case of *Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd And Ors* [2010] MLJU 1854 (HC), Mary Lim J (as she then was) in dismissing an application to transfer and consolidate a Shah Alam High Court suit with a Kuala Lumpur High Court suit, held at para 15 of the judgment as follows:

> [15] Therefore, the general rule is that proceedings will not be consolidated, even if those proceedings were before the same court; what more if the proceedings are in different courts and occurring over a space of time. The whole rationale behind consolidation is to benefit everyone concerned by saving time and costs, and avoiding duplicity; be it of witnesses, counsel or the court. In this case, the two proceedings have separately progressed uneventfully and without affecting one another. Of importance is the fact that the current petition is ready and set for full hearing and disposal after an interlocutory appeal was recently determined in the Court of Appeal with a direction that the hearing of this petition be expedited. In the circumstances as examined, do not see the exercise as achieving the aim of saving costs and time.
>
> More so when there is really nothing common or the same. In fact, prejudice and embarrassment may be occasioned especially to third parties like the second and third defendants who are not parties in both proceedings if the application was allowed. Under such circumstances, it would certainly not be desirable for the application to be allowed. There may even be delay while this petition is already primed for disposal and this would certainly not be in the interest of justice.

[25] As such, I dismiss encl 5 with cost of RM3,000 (*subject to 4% allocatur*) to be paid by the plaintiffs to the defendant.

ENCLOSURE 15 — THE DEFENDANT'S APPLICATION TO STRIKE OUT THE WRIT

[26] The defendants application to strike out the writ and statement of claim are premised on the following grounds:

(a) the defendant performs a public and statutory duty to ensure an orderly and fair market in the securities that are traded through its facilities and to uphold the protection of investors;

(b) the plaintiffs' claim against the defendant is based on public law elements and allegations arising from the functions and regulatory powers of the defendant under both the Capital Markets and Services Act 2007 ('the CMSA 2007') and the ACE listing requirements ('ACE LR'), which were exercised in issuing the listing committee ('LC') and appeals committee ('AC') decisions, dated respectively;

(c) under the ACE LR, the defendant has the power to commence enforcement actions and to impose appropriate penalties in the event of any breach of the ACE LR by, amongst others, a listed company and/or its directors. The plaintiffs, as directors of a listed company at the material time of the breach (who had undertaken to comply with the ACE LR) are/ought to be aware of the defendant's powers under the ACE LR including the enforcement powers;

(d) hence, the LC's and AC's decisions can only be challenged by the plaintiffs by way of judicial review proceedings and not by way of a writ action. Therefore, the plaintiffs' writ action before this honourable court is wrong in law;

(e) at no juncture did the plaintiffs file an application for judicial review to challenge the decisions of the defendant. Furthermore, the time frame for any such application has expired as it is now over a year since the plaintiffs were notified of the AC's decision;

(f) these proceedings are filed purely to delay and/or hinder the defendant from enforcing the LC's decision that was subsequently upheld by the AC; and

(g) the powers of the defendant are exercised to protect the investor public's interest and to ensure the investors' confidence in the capital market. The defendant should be left to exercise their powers unencumbered when bringing any action against individuals for breaches of its rules including the ACE LR.

[27] It is also pertinent to state that the defendant at para 4 of the amended defence had also pleaded that the proper course of relief open to the plaintiffs was/is to file judicial review proceedings against its decision vide the LC/AC.

[28] At this matter revolves around the decision of the defendant to impose punishment/fines under the ACE LR, it is perhaps pertinent to set out the general framework of the defendant and the ACE LR which have been set out in their statement of defence as follows:

> 2. The defendant is a stock exchange licensed under the Capital Markets and Services Act 2007 ('CMSA 2007') and has a statutory duty pursuant to section 11 of the CMSA 2007 to ensure, so far as is reasonably practicable, a fair and orderly market for the securities that are traded through its facilities. In addition to section 11, section 9 of the CMSA 2007 vests the defendant with the statutory duty to ensure market integrity whilst providing statutory force to the Bursa Securities' ACE Market listing requirements ('ACE LR'), which in turn, empowers the defendant to initiate enforcement actions where there is a breach of the ACE LR and impose, amongst others, fines.
>
> 3. The ACE LR is a set of requirements that stipulate the minimum standards of conduct that must be complied with by all applicants, listed corporations, their directors, officers, advisers or other persons to whom the ACE LR are directed. So long as a listed corporation remains on the Official List of Bursa Securities, it must comply with the ACE LR. The following provisions of the ACE LR are relevant to these proceedings:
>
> (i) The purpose of the ACE LR as stated in Rule 2.03 of the ACE LR is: The purpose of these Requirements is to set out the requirements that must be complied with by all applicants, listed corporations, their directors, officers, advisers or other persons to whom these Requirements are directed. Failure to comply with any of these Requirements will amount to a breach in respect of which actions may be taken or penalties may be imposed, or both;
>
> (ii) Rule 2.04 of the ACE LR sets out the principles upon which the ACE LR are based, amongst others:
>
> (a) that all applicants will be of a certain quality and have a record of operations of adequate duration;
>
> (b) that investors and the public will be kept fully informed by the listed corporation of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure will be made of any information which may reasonably be expected to have a material effect on the price, value or market activity in the securities of listed corporations;
>
> (c) that all holders of securities will be treated fairly and equitably;
>
> (d) that directors, officers and advisers of listed corporations will maintain the highest standards of integrity, accountability, corporate governance and responsibility; and
>
> (e) that directors of listed corporations will act in the interest of the corporation as a whole, particularly where the public represents only a minority of the shareholders or where directors or major shareholders have material interests in transactions entered into by listed corporations;

(iii) Pursuant to Rule 2.05 of the ACE LR, a listed corporation, whether or not admission of its securities has taken place before the ACE LR are prescribed, is, by virtue of its admission to the Official List, bound by the ACE LR. Further, a listed corporation, its directors, officers, advisers or any other person to whom the ACE LR are directed must comply with the ACE LR for so long as the listed corporation or its securities remain listed on the Official List, even during periods when the listed corporation's securities are suspended from trading;

(iv) Rule 9.22 which provides that:

Quarterly report

(1) A listed corporation must announce to the Exchange, an interim financial report that is prepared on a quarterly basis ('quarterly report'), as soon as the figures have been approved by the board of directors of the listed corporation, and in any event not later than 2 months after the end of each quarter of a financial year.

(2) The listed corporation must include in the quarterly report, the information set out in Appendix 98 and any other information as may be required by the Exchange.

(3) If a change in the financial year is proposed by a listed corporation, such listed corporation must consult the Exchange as to the period to be covered by the quarterly report.

(v) Rule 9.23 which provides that:

Issue of annual report

(1) A listed corporation must issue its annual report that includes annual audited financial statements together with the auditors' and directors' reports of the listed corporation, to the Exchange and shareholders within 4 months from the close of the financial year of the listed corporation.

(vi) Pursuant to Rule 16.13 of the ACE LR:

A director of a listed corporation must not:

(a) cause, aid or abet a breach of these Requirements by such listed corporation; or

(b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, such listed corporation to commit a breach of these Requirements.

(vii) Rule 16.19(1)(b) which stipulates that the types of action or penalty that the Exchange may take or impose against a director or officer of a listed corporation for a breach of the ACE LR include any one or more of the following:

(i) issuance of a caution letter;

(ii) issuance of a private reprimand;

(iii) issuance of a public reprimand;

(iv) imposition of a fine not exceeding RM1 million;

(v) issuance of a fetter directing the person in default to rectify the non-compliance, which direction will remain in force until it is revoked;

(vi) imposition of one or more condition(s) for compliance;

(vii) imposition of a moratorium on or prohibition of dealings in the listed corporation's and/or other listed securities by the relevant director, officer or other person; or

(viii) any other action which the Exchange may deem appropriate, subject to consultation with the Securities Commission;

(viii) Rule 16.28 that states that a fine or any portion of a fine, or cost ordered by the Exchange, remaining unpaid by a person, is a debt owing by the person to the Exchange;

(ix) Rule 16.24 of the ACE LR states that 'the Exchange will appoint a committee or sub-committee or officer(s) of the Exchange or Exchange Holding Company to discharge the exercise of its powers under Rules 16.18 and 16.19' in relation to enforcement proceedings; and

(x) In line with this, the Listing Committee ('LC') and the Appeals Committee ('AC') were formed to hear, deliberate and make decisions on alleged breaches of the ACE LR by listed corporations, their directors and/or other persons bound by the ACE LR.

[29] As highlighted earlier in the judgment, there is no dispute that the LC had imposed fines on the plaintiffs which were affirmed by the AC and that the plaintiffs did not challenge those decisions by way of judicial review proceedings. In fact, if one peruses the responses by the plaintiffs to the LC vide their written reply dated 29 October 2018 (see exh M2 of encl 7), it will become apparent that it was never contended by the plaintiffs that the LC had no power to take action or to fine. The contentions raised by the plaintiffs at that stage related to issues of defective charge, allegations of bias and the plaintiffs further provided explanations for the delay. Similarly, when the plaintiffs filed an appeal to the AC (vide exh AA4 of encl 7), the appeal was amongst others on the grounds that the LC had taken into account irrelevant considerations, failed to take into account relevant considerations and acted with bias — all of which are classic grounds to premise a judicial review application upon.

[30] Vide this writ, the plaintiffs now seek the following reliefs at para 91 of the amended statement of claim:

91. Wherefore the Plaintiffs claims:

A No Power to Impose Fines

85.1 *A declaration that Rule 16.19 of ACE Listing Requirement is in contravention of Article 97 of Federal Constitution*;

85.2 A declaration that the defendant has no power to impose fines on the Plaintiffs;

B 85.3 Further to prayer (1) above, a declaration that the defendant, whether through the Listing Committee and/or the Appeal Committee, do not IJave the requisite power to impose fines on the Plaintiffs;

Listing Committee

C 85.4 Further to prayer (1) and/or (2) above, a declaration that the decision of Listing Committee dated 18.12.2018 to impose fines on the Plaintiffs is illegal, null and void;

Appeal Committee

D 85.5 Further to prayer (1) and (2) above, a declaration that the decision of Appeal Committee dated 6.5.2019 to impose fines and/or otherwise to confirm the decision of the Listing Committee to impose fines on the Plaintiffs is illegal, null and void;

Capital Markets and Services Act 2007

E 85.6 A declaration that Originating Summons No WA-A54–146–11 of 2019 filed by the defendant against the Plaintiffs to claim monetary amounts is illegal, null and void;

85.7 A declaration that s 360(1)(c)(i), (J), (K) and/or (P) of the Capital Markets and Services Act 2007 does not give the defendant the power to seek or otherwise enforce any monetary claim by the defendant against the Plaintiffs;

F

85.8 Costs; and

85.9 Any other relief that this Court shall consider beneficial and just in the circumstances.

G **[31]** Before I delve into the merits of the application in encl 15, at the outset I am indeed mindful of the principles that guide courts when faced with an application under O 18 r 19 in that the power of the courts for striking out an action is exercised only in plain and obvious cases and where a case is obviously unsustainable. This was held by Ramli Ali J in the case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 (FC) where His Lordship held as follows:

H

> [28] The basic test for striking out as laid down by the Supreme Court in Bandar Builder is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily ...

I

[32] On the merits of encl 15, based on case law, it has become apparent to me that a decision on the same will primarily rest on a determination of whether the plaintiffs' claim herein is premised solely or mainly on public law elements as contended by the defendant or an issue of private law as contended by the plaintiffs. This determination is critical in my view as it will then be a decisive factor as to whether or not the defendant's contention that the plaintiffs ought to have commenced judicial review proceedings is with merit.

[33] The starting point for the discussion on what matters ought to be brought by way of judicial review proceedings and the consequences of not doing so would be to refer to the decision of the Federal Court in the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 (FC) where it was held that the court must be circumspect in allowing matters which should be brought by judicial review proceedings to be commenced in any other form.

[34] In *Ahmad Jefri*'s case, the appellant was a government officer who was dismissed under the Public Officers (Conduct and Discipline) Regulations 1993 which imposes statutory conditions and restriction on the conduct and dismissal of government officers. The appellant subsequently filed a writ of summons and statement of claim seeking, amongst others, a declaration that his dismissal was null and void. The Federal Court upheld the decision of the courts below in striking out the writ of summons and statement of claim on the ground that the proper forum for challenge ought to be by way of judicial review. In coming to this decision, the Federal Court held that a challenge to a decision made by a public authority ought to be done by way of judicial review when there is a presence of an element of public law necessary to attract remedies of administrative law. James Foong FCJ held that:

> [i]f the claim for infringement is based solely on substantive principles of public Jaw, then relief must be by way of an application for judicial review under O 53 of the RHC. If it was commenced by writ or by originating summons, then this would be considered an abuse of the court's process, and should be struck.

[35] The Federal Court in dismissing the appeal further held as follows:

> (3) Not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, there were clearly elements of public law present. The appellant was a public officer subject to the Public Officers (Conduct and Discipline) Regulations 1993 ('the regulations'). He had been dismissed under a statutory law — the regulations — by a body which had acted within the scope of such statutory power. Although the decision to dismiss the appellant involved the dismissal of an employee by an employer, just like a master dismissing his servant — which constituted a private law matter — the fact that there were statutory conditions and restrictions imposed by the regulations on the conduct and dismissal of the appellant underpinned the public law element in the instant case. The instant case was thus suitable for judicial

review (see paras 21, 36 & 61); *R v East Berkshire Health Authority, ex-parte Walsh* [1985] 1 QB 152 and *Wendal Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 22 distinguished.

[36] The Federal Court went on further hold that a challenge on the use of appropriate procedure is very much fact based and it is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute and if so, the appropriate process should be by way of O 53. The Federal Court further elucidated that if it is a mixture of public and private law then the court must ascertain which of the two is more dominant and in the event the claim has substantial public law elements, then, the procedure under O 53 must be adopted.

[37] Similarly, in the case of *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2009] 1 MLJ 676; [2005] MLJU 113 (CA), an engineer sought declaratory relief via an originating summons against the Board of Engineers rather than by way of judicial review proceedings. The claim was struck off by the High Court and such decision was upheld by the Court of Appeal on the basis that the claim ought to have proceeded by way of judicial review as the prayers sought involved principally and primarily public law rights rather than private law rights.

[38] I would also refer to the decision of the Court of Appeal in *Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor* [2014] 3 MLJ 74 (CA). In this case, the respondent was terminated as a 'Pengerusi Jawatankuasa Kariah bagi Masjid' by the *Jabatan Agama Islam Negeri Perak* ('JAIP') and commenced an action in the High Court by a writ of summons and statement of claim challenging such termination. JAIP's application to strike out the plaintiff's writ on the basis that it ought to have commenced via judicial review proceedings was dismissed by the High Court.

[39] On appeal, the Court of Appeal referred to *Ahmad Jefri*'s case, and adopted the approach to the private law/public law dichotomy in allowing the appeal and held as follows:

> [44] Based on these principles and the exhortation that a court has to be circumspect in allowing a public law matter to be proceeded by a procedure other than an application for judicial review, and considering the total circumstances of this case and the nature of the respondent's claim, although couched in the language of applying for a declaration of 'status', we are of the considered opinion that this is a case that should have been filed as an application for judicial review under O 53 of the Rules of the High Court 1980. There is absent any significant private law element, and is almost wholly exclusively centred on a public law argument on absence of statutory jurisdiction (on the part of JAIP) and breach of the rules of

natural justice. In the circumstances, and for these reasons, we are constrained to depart from the decision of the High Court, and to therefore set aside the order of the judicial commissioner.

[40] Having referred to the above cases, it is clear that it is now upon this court based on the facts of this case to decide and ascertain whether there is a public law element in this dispute. If I were to answer this in the affirmative, the natural consequence would have to be that the contention of the defendant is clearly with merit.

[41] I have in para 31 above set out the prayers sought by the plaintiffs herein whereby it is beyond preadventure that the plaintiffs essentially challenge the powers of the defendant and the LC/AC to impose fines and that such fines imposed were illegal, null and void. Further, the plaintiffs' contend that the defendant is not competent to bring enforcement action as they have done vide OS146. However, as I have decided earlier in relation to encl 5, the competency or otherwise of the enforcement action will be a matter which will have be dealt and decided by the sessions court in OS146.

[42] In my considered view, the plaintiffs challenges on the LC's and AC's decision which were made in the discharge of the defendants statutory and regulatory duties under the CMSA and the ACE LR which were enacted pursuant to ss 9 and 11 of the CMSA 2007 are clearly centred on public law arguments. Similarly, the contentions of the plaintiffs of an absence of statutory jurisdiction to impose fines are predominantly issues concerning substantive principle of public law. As such, these challenges ought to have been properly ventilated through by judicial review proceedings.

[43] My view above is fortified in that the defendant's public law element and duties have been recognised by the Federal Court in *OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 (FC). Here, the Federal Court found that the Kuala Lumpur Stock Exchange (the defendant's predecessor), in being a hybrid company, ie a company incorporated under the Companies Act 1965 but regulated by the Securities Industry Act 1973 (which has since been repealed and replaced by the CMSA 2007) has an element of public duty. In that case, the Kuala Lumpur Stock Exchange had imposed a fine against a stock broker who then applied for an order of certiorari to quash the said decision. The High Court dismissed the application on the basis that the Kuala Lumpur Stock Exchange was not a body in which certiorari may issue. However, on appeal to the Federal Court, Abdoolcader J allowed KLSE's appeal and remitted the matter back to the High Court for the certiorari application to be heard on its merits. In doing so, the Federal Court after having extensively set out the constitution, structure, purpose and functions of the Exchange concluded as follows:

> In the fight of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the Exchange is a hybrid corporation — a company incorporated under the Companies Act but recognised and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of s 6(2)(b)(vi) and (c) which prescribe the public interest as the prime consideration.
>
> ...
>
> The Committee which is responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinaly functions it necessarily has the duty to act judicially in the adhibition of that power and it is therefore subject to judicial review by way of certiorari and prohibition.

[44] The decision of the Federal Court above clearly supports the defendant's contention that decisions of the defendant in imposing fines and punishment under the ACE LR are decisions that ought to be challenged by judicial review proceedings. This is further fortified by the fact that in almost all previous cases in relation to decisions of the LC and AC, the same were challenged by way of judicial review proceedings. See cases such as *Mohd Faidzal bin Ahmad Mahidin v Bursa Malaysia Securities Bhd* [2017] MLJU 495, *Lo Man Heng v Bursa Malaysia Securities Bhd* [2017] MLJU 490 and *Can-One Bhd & Ors v Bursa Malaysia Securities Bhd* [2013] MLJU 1640.

[45] Further, the plaintiffs' attempt to couch their relief as declaratory orders does not transform the matter into a private law matter as the ultimate impact of the plaintiffs' claim is to quash the decision to impose the fines on the basis that there is no authority to do so. As recognised by the Court of Appeal in *JAIP*'s case, the mere inclusion of a declaratory prayer does not translate a matter of public law into a matter of private law as it would then be very easy for an aggrieved person in an issue of public law to sidestep the rigours of O 53 by merely including a prayer for declaration.

[46] One particular decision of the High Court which facts are similar is the recent decision of *Law Siew Ngoh*. In that case, a director was found guilty of breaching listing requirements and sanctions were imposed and upheld by the Bursa's AC. The said directors judicial review application was dismissed by the High Court and the Court of Appeal and leave to appeal to the Federal Court was also refused. Shortly after the judicial review action was commenced, the Bursa filed an originating summons in the sessions court to enforce the fines whereby such order was granted. On appeal to the High Court against the

order of the session's court, His Lordship Azizul Azmi J in dismissing such appeal held as follows:

> [30] Where a regulated person has had enforcement action taken against him or her under rules of an exchange, any challenge against this enforcement action has first be taken up through the prescribed appeal process. In the present case, the defendants appealed against the decision of the listing committee to the appeals committee. There is no further right of appeal.
>
> [31] If the regulated person is still dissatisfied with the dismissal of his appeal, he may do one of two things: if the rights of the person that is claimed to have been infringed is a private law right, then the appropriate course would be to commence a writ action. Where however the rights that are purported to have been infringed are public law rights, then the proper course would be apply for judicial review.
>
> [32] In the case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 5 CLJ 698, the Court of Appeal accepted the proposition that the deliberations of the exchange would be amenable to review (see para 37 of the decision) on account of the public duties that it performs.

[47] On the facts of this case, it is undisputed that the plaintiffs had not filed an application for judicial review against the decision of the LC/AC. In my considered view, there is merit in the defendant's contention that the plaintiffs action herein is clearly an afterthought and a belated attempt to challenge the sanctions imposed and also only filed after the filing of OS146 by the defendant to enforce the fines.

[48] Furthermore, in my view, there is nothing precluding the plaintiffs from seeking an extension of time now to file judicial review proceedings. Also, as highlighted earlier, the plaintiffs have had an opportunity to raise the issues relating to Bursa's power to fine as they have done in OS146, which is pending decision. Such issues may also then be further ventilated by the High Court in any appeal against the OS146 decision. Hence, despite not having filed judicial review proceedings todate, the plaintiffs have still had the opportunity to challenge the validity of fines imposed as they have done so in the OS146 proceedings.

[49] I have also taken into account and have been persuaded by the defendants contention that if the plaintiffs are allowed to proceed with this writ action, it would have an adverse impact and will open the floodgates for challenges against the decisions of other statutory and public bodies to be done by way of an OS or writ without complying with the necessary safeguards of judicial review proceeding. In this regard, as observed by the Federal Court in *Ahmad Jefri*'s case, the basic objective of the stringent conditions imposed by O 53 are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration.

[50] On behalf of the plaintiffs, learned counsel submits that their claim involves a private law element and contends that the LC can issue any punishment except the punishment of a fine. Learned Counsel relies heavily on a decision of the Court of Appeal in the case of *Bursa Malaysia Securities v Gan Boon Aun* [2018] MLJU 1416 (CA) as a basis to submit that fines by the defendant can only be enforced by statute and not by the LC. However, that case dealt with the issue of limitation and in my view does not assist the plaintiff. In that case, a director was fined by Bursa for breaching the listing requirements. The said director attempted to quash the AC's decision by way of judicial review proceedings which was rejected by the High Court and upheld by the Court of Appeal. Bursa then filed an originating summons in the High Court pursuant to s 360 of the CMSA to enforce payment of the outstanding fine.

[51] However, upon the director's application, the learned High Court judge struck out Bursa's OS premised on s 6(1)(d) and 6(4) of the Limitation Act 1953 on the basis that an action to recover any penalty by any written law shall not be brought after the expiration of one year. In allowing Bursa's appeal, the Court of Appeal held that fines imposed by Bursa should be distinguished from a penalty and that there is nothing in s 11 of the CMSA which gives Bursa the power to impose fines and that s 360 of the CMSA among others provides for the enforcement through a court order a penalty/fine imposed under the LR and as such, the limitation period that applied to Bursa to enforce the penalty/fine was six years.

[52] In my view, the above decision deals primarily with the issue of Bursa's right to enforce fines or penalties and the limitation period for doing so. In fact, even in that case, as can be seen, the director had attempted to challenge the fines imposed by judicial review proceedings. In any event, even if the fine is not one considered to be imposed 'under written law', this cannot detract from the fact that the issues herein primarily revolve around issues of public law.

[53] As such, based on the cases referred to earlier of *Ahmad Jefri* and *OSK and Partners*, both of which the decisions of the Federal and Supreme Court, the predominant factor to be considered is the nature of the decision of the defendant to impose the fines which were made in the discharge of its statutory and regulatory duties under the CMSA and the ACE LR which was enacted pursuant to ss 9 and 11 of the CMSA.

[54] Having considered the facts of this case and the various cases as referred to above, I have no hesitation in holding that the decision of the defendant to impose the fines on the plaintiffs primarily centre on public law arguments and public law rights and as such, relief to the plaintiffs must be by way of an application for judicial review under O 53 of the Rules of Court 2012. As held

by the Federal Court in the case of *Ahmed Jefri*, in the event a party commences proceedings by writ instead of by way of judicial review proceedings, it would tantamount to an abuse of the court's process and should be struck out.

CONCLUSION

[55] Based on all the above I grant order in terms of encl 15 and strike out the plaintiffs' writ and statement of claim with cost of RM10,000 (*subject to 4% allocatur*) to be paid by the plaintiffs to the defendant.

Plaintiff's application in encl 5 dismissed with costs of RM3,000 and defendant's application in encl 15 to strike out plaintiff's claim and statement of claim allowed with costs of RM10,000.

Reported by Mohd Kamarul Anwar